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Date: February 21, 2003

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Original ☐ will / ☒ will not follow.

Pages (including fax sheet):

Comments:

Additional copy sent via electronic mail to:  
mooney.charlotte@epa.gov.

Regards,  
Amy Duvall

10770-13467/18

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February 21, 2003

**VIA FACSIMILE & ELECTRONIC MAIL**

Ms. Charlotte R. Mooney  
Chief, Generator and Recycling Branch  
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Office of Solid Waste and Emergency Response, Hazardous Waste Identification Division  
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Re: Suggestions for Definition of Solid Waste Rulemaking

Dear Ms. Mooney:

At the request of Jim Roewer, Executive Director of the Utility Solid Waste Activities Group ("USWAG"),<sup>1</sup> I write to share USWAG's suggestions for re-defining the regulatory definition of "solid waste" to encourage increased recycling of secondary materials. We ask that EPA seek public comment on these ideas in EPA's upcoming definition of "solid waste" rulemaking proposal. USWAG believes this rulemaking initiative offers an important opportunity for EPA and the public to actively explore options for providing true meaning to the "Resource Recovery" component of RCRA. USWAG looks forward to working with EPA on this important effort.

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<sup>1</sup> USWAG was formed in 1978, and is an informal consortium of approximately 80 energy industry operating companies and associations, including the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and the American Gas Association ("AGA"). EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly owned electric utilities. AGA is the principal national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

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As the Agency recognizes, regulation of recycling under the current hazardous waste regulatory regime has impeded the development of recycling opportunities. Rather than fostering innovation necessary to establish a widespread market for recycling, existing rules often complicate recycling activities and snuff out innovative technologies through the imposition of overly burdensome regulations for many materials that are more commodity like than waste like. Electric utilities manage a variety of materials—spent solvents, mercury-containing equipment, batteries, unused and off-spec paint, lamps, electronics equipment, and antifreeze—that would be prime candidates for increased recycling under an equally protective but more balanced regulatory regime.

## Suggestions to Foster Increased Recycling

In response to litigation, EPA is revisiting the regulatory definition of "solid waste." In *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) ("ABR"), the court overturned the portion of the Phase IV LDR rule that defined as solid waste materials generated and reclaimed within the primary mineral processing industry unless they were stored in tanks, containers, containment buildings, or on pads or unless they were reused immediately without temporary storage. The court found that EPA's attempt to prohibit temporary storage of these materials pending reclamation conflicted with RCRA's definition of solid waste. *Id.* at 1053. This case extends to all reclaimed materials, not just mineral processing wastes.

We understand EPA plans to develop a broad proposal evaluating how the *ABR* decision affects the RCRA recycling program and that the proposal will specifically address the regulatory status of materials undergoing reclamation. 67 Fed. Reg. 74209, 74226 (Dec. 9, 2002). In the context of reclamation, "[EPA] plan[s] to discuss options for how to distinguish materials that are discarded from materials that remain in use in a continuous industrial process and [the Agency] anticipates proposing a definition of 'continuous industrial process.'" *Id.*

USWAG agrees that "removing the specter of RCRA control where it is not necessary can spur increased reuse and recycling of hazardous waste, and will lead to better resource conservation and improved materials management overall." *Id.* At the same time, USWAG is concerned EPA will limit its evaluation of this important issue to only materials that remain in use in a "continuous industrial process." This will not serve the broader goal of removing RCRA's existing barriers to recycling. In particular, it will fail to address the many opportunities for increased recycling that can occur outside a "continuous industrial process," such as where generators of valuable secondary materials provide the materials to third-parties for materials recovery or reclamation.

USWAG believes the combination of the suggestions below will help to remove the practical and regulatory barriers to recycling for the utility industry and others—including opportunities extending beyond a "continuous industrial process." USWAG recommends that the upcoming rulemaking proposal request comment on the following regulatory options:

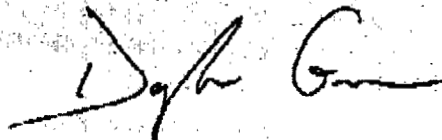
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- A revised regulatory structure based on defining "discarded material" as material that is "disposed of, thrown away, or abandoned," but which does *not* include "recycling" as an indicator of discard;
- An exclusion from the definition of "solid waste" for material burned for energy recovery in a unit that is permitted under Title V of the Clean Air Act; and
- Recognition by EPA that a material is recycled, and therefore *not* a waste, when it is used or reused to make a product, even when such activities require reclamation, or, in the alternative, creation of a broader conditional exclusion from the definition of "solid waste" for materials recycled by reclamation (e.g., spent solvents, mercury-containing equipment, batteries, unused and off-spec paint, lamps, electronics equipment, antifreeze), paralleling the Agency's June 2002 proposal to revise existing federal hazardous waste regulations to encourage recycling and better management of cathode ray tubes ("CRTs") through a contingent management approach (67 Fed. Reg. 40508 (June 12, 2002)).

The policy, technical, and legal reasons underlying the proposed conditional exclusion for recycled CRTs apply with equal force in the case of other materials recycled by reclamation. As USWAG noted in its August 12, 2002, comments on the proposal, the conditions of the CRT exclusion, which are keyed to release issues associated with handling used materials, will ensure that the recycled materials are *not* a part of sham recycling, but rather are handled as articles in commerce or commodities, as opposed to wastes. EPA has historically recognized that commodity-like materials destined for recycling should not be encompassed by the definition of "solid waste" and there is no reason not to extend this same rationale to qualified materials recycled by reclamation. Creation of a conditional exclusion from the definition of "solid waste" for qualified materials recycled by reclamation will encourage recycling and reuse of valuable material in furtherance of RCRA's twin goals of "Resource Conservation" and material "Recovery." See RCRA § 1002(c), 42 U.S.C. § 6901(c).

Again, USWAG looks forward to working with EPA on this effort and we would be delighted to follow-up with you and/or your staff if you have questions regarding the issues outlined above.

Very truly yours,

Douglas H. Green  
Counsel to USWAG

cc: James Roewer, USWAG Executive Director

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